Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141

In the Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., ET AL., PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL., RESPONDENTS

AMERITECH CORPORATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR CROSS-PETITIONER AMERITECH CORPORATION

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REPLY BRIEF FOR CROSS-PETITIONER AMERITECH CORPORATION

Petitioners' agenda in defending *both* the "all elements" rule *and* Rule 315(b) is clear: they seek to overturn the Eighth Circuit's ruling that incumbent local exchange carriers ("incumbent LECs") may not be required to provide new entrants with the so-called "unbundled network element platform" or UNE platform. The UNE platform is a preassembled combination of network components that consists of *precisely* the same facilities, in *exactly* the same configuration, as the network designed and used by the incumbent to provide its own retail services to customers and resale services to new entrants. However, large new entrants like AT&T and MCI seek to obtain the platform *not* at the statutory wholesale discount mandated by Congress for the resale of retail services, but rather at the lower cost-based rates reserved for unbundled network elements.

Our opening brief (at 15-20, 24-31) demonstrated that the UNE platform would obliterate the distinction between the unbundled network element and resale entry options established in sections 251(c)(3) and (c)(4) of the Telecommunications Act of 1996 ("1996 Act"). See also Bell Atl. Br. 46-65; GTE Br. 62-71. Significantly, the Association for Local Telecommunications Services ("ALTS"), an association of smaller facilities-based new entrants that compete with incumbent LECs in local service markets, concurs. As ALTS correctly observes, "[h]ad Congress intended that resold services be made available at 'cost' pursuant to section 251(c)(3), it [would] not have created a separate statutory mechanism" for resale. ALTS Opposing Br. 8.

Petitioners do not dispute the central proposition underlying our and ALTS's position: that the 1996 Act prohibits new entrants from obtaining the incumbent's resale services at the lower cost-based rates reserved for unbundled network elements. Rather, petitioners argue — contradicting what

they have said in other forums — that the UNE platform is somehow different from the incumbent's resale services. As explained below, their argument has no merit. Indeed, former FCC Chairman Reed Hundt, who presided over the agency's promulgation of the "all elements" rule and Rule 315(b), acknowledged just three days ago that "[t]he UNE platform is a version of resale."[1] The only difference between the platform and resale services is price, which is *precisely* what creates the arbitrage opportunities that unravel the 1996 Act's distinction between the unbundled network element and resale entry options.

Our opening brief (at 34-37) also demonstrated that the UNE platform is not a combination of "unbundled" network elements within the meaning of section 251(c)(3). Petitioners argue that two physically connected network elements are "unbundled" if a new entrant has the option to acquire one of the elements but not the other. We explained that even if that were true, the UNE platform still would not be a combination of "unbundled" network elements because entrants acquiring the platform do not have the option of obtaining the platform's interoffice transmission component without also taking the local switching component. Petitioners respond with silence, effectively conceding that the platform cannot be classified as a combination of "unbundled" network elements under section 251(c)(3).

Finally, our opening brief (at 32-33) demonstrated that the UNE platform violates the plain language of section 251(c)(3) because it does not give new entrants "access" to network elements "on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). The FCC's principal response — that section 251(c)(3) does not *require* that new entrants gain "access" to network elements at a "technically feasible point," but only gives them the *option* of doing so —

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[1] *In the Matter of: Telecommunications Policy Open Meeting*, Tr. 235 (Ill. Comm. Comm'n July 14, 1998) (statement of Reed Hundt).

rests upon a patently absurd reading of the statute. And petitioners' argument that new entrants would gain "access * * * at any technically feasible point" to the UNE platform through the incumbent's operations support systems ("OSS") is equally unsound. The argument simply proves too much: new entrants purchasing the incumbent's resale services under section 251(c)(4), which does *not* give the new entrant "access * * * at a technically feasible point" to the incumbent's facilities, *also* use the incumbent's OSS — indeed, in precisely the same manner as an entrant acquiring the platform.

For these reasons, the UNE platform is incompatible with the 1996 Act. Pet. App. 71a. And while this Court should reverse the Eighth Circuit's approval of the FCC's "all elements" rule — and affirm the Eighth Circuit's vacatur of Rule 315(b) — at the very least the Court should hold that both rules are invalid insofar as they require incumbents to provide the UNE platform at the cost-based rates reserved for unbundled elements.

ARGUMENT

I. The UNE Platform Violates Section 251(c)(3) Because It Does Not Provide New Entrants With "Access To Network Elements On An Unbundled Basis At Any Technically Feasible Point."

Petitioners' defense of the UNE platform fails to come to grips with the plain text of section 251(c)(3). As we have explained, the UNE platform, while a preassembled combination of the incumbent carrier's *facilities*, is not a combination of *unbundled network elements* within the meaning of section 251(c)(3). Ameritech Br. 32-37. Thus, irrespective of the fate of the "all elements" rule, section 251(c)(3) prohibits new entrants from obtaining the UNE platform at cost-based rates. The FCC, AT&T and MCI offer nothing to refute this conclusion.

A. The Components Of The UNE Platform Are Not "Unbundled" Network Elements Within The Meaning of Section 251(c)(3).

Section 251(c)(3) establishes the ground rules for the unbundled network element entry option, and requires incumbent LECs to provide "access" to network elements "on an unbundled basis." 47 U.S.C. § 251(c)(3). Because the term "unbundled" means physically separated, the UNE platform — which consists of all elements in the incumbent's entire bundled network — obviously could not be a combination of "unbundled" network elements. Petitioners assert, however, that the Eighth Circuit was wrong in holding that the term "unbundled" means physically separated. Rather, they maintain, two physically connected network elements are "unbundled" so long as a new entrant has the option to acquire one of the elements but not the other. See Ameritech Br. 35.[2]

Even if petitioners were right on that score,[3] the UNE platform *still* would not be a combination of "unbundled" network elements. It is undisputed that the UNE platform consists of a combination of numerous incumbent LEC facilities, including "shared transport" and "switching."[4] The

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[2] See also Ex Parte Letter of AT&T's Albert M. Lewis, Director and Senior Attorney for Federal Government Affairs, to William F. Caton, Acting Secretary of the Federal Communications Commission, CC Docket No. 96-98, at 5 (Aug. 8, 1997) ("when Congress used the term 'unbundled' in § 251(c)(3)," it meant to require incumbent LECs "simply to state a separate *price* for the element and give consumers the *option* of declining to purchase the element from that carrier and obtaining it from a different source") (AT&T's emphasis).

[3] They are, in fact, wrong. See Bell Atl. Br. 53-57; GTE Br. 65-71; U S WEST Br. 47-53.

[4] AT&T witnesses have testified in other forums that "[t]he platform is a combination of unbundled network elements," including "the unbundled switch, shared transport, * * * and tandem switching." *In the Matter of Application by Ameritech Michigan for Authorization Under Section 271*

FCC has defined "shared transport" and "switching" to be separate network elements. See 47 C.F.R. §§ 51.319(c), (d) (Pet. App. 296a-298a). And the FCC has expressly acknowledged that a new entrant does not have the option of taking the transport component of the UNE platform without *also* taking the switching component. See *Third Reconsideration Order*, ¶ 47 (new entrant acquiring "shared transport" from the incumbent LEC "must also take local switching") (J.A. 248).[5]

As explained in our opening brief (at 35-37), these admissions are fatal to the UNE platform. Because a new entrant *must* take the transport and switching components of the platform together as an integrated whole, and thus does *not* have the option of taking the former without the latter, the platform is not a combination of "unbundled" network elements under section 251(c)(3) — *even* under petitioners' unduly restrictive definition of the term "unbundled." Indeed, petitioners' definition would invalidate *any* preassembled combination of two or more network elements where the entrant does not have the option of taking one constituent element without taking another. Those elements could not be "unbundled" elements because, as AT&T puts it (AT&T Br. 38-39), the entrant would not have "the option of declining to purchase [each element] as part of a package."

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of the Communications Act to Provide In-Region InterLATA Services in the State of Michigan, CC Docket No. 97-137, Affidavit of Robert V. Falcone and Maureen E. Gerson on Behalf of AT&T Corp., ¶ 13 (filed June 10, 1997).

[5] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295, 12 F.C.C.R. 12460 (1997) ("*Third Reconsideration Order*") (J.A. 1359-1402), petitions for review pending, *Southwestern Bell Tel. Co. v. FCC*, Nos. 97-3389 et al. (8th Cir.).

The FCC, AT&T and MCI remain silent on this matter, apparently hoping that our point will get lost amid the welter of arguments advanced in this case. But petitioners' ostrich-like tactics cannot obscure the fact that, even using their own definition of "unbundled,"[6] the UNE platform is not a combination of "unbundled" network elements.

In sum, the text of section 251(c)(3) prohibits new entrants from acquiring the UNE platform at the cost-based rates reserved by section 252(d)(1) for unbundled network elements. For that reason, even if this Court were to uphold the facial validity of the "all elements" rule and Rule 315(b), it should still hold that section 251(c) invalidates the UNE platform.

B. The UNE Platform Does Not Give A New Entrant "Access" To Network Elements "At A "Technically Feasible Point," As Required By Section 251(c)(3).

The UNE platform irreconcilably clashes with the text of section 251(c) in another way. The statute requires incumbent

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[6] Apparently recognizing that their interpretation would invalidate the UNE platform and many other preassembled network element combinations, the FCC and MCI hastily retreat. In its opening brief, the FCC vigorously argued that "the term 'unbundled' * * * denote[s] giving someone a *choice* of elements at separate prices." FCC Br. 44 (emphasis added). The FCC shifts gears in its response brief, even going so far as to mischaracterize what it said in its opening brief. FCC Reply 25 ("[a]s we observe in our opening brief (at 44-45), however, the prevailing definition of 'unbundled' * * * was 'offered at separate prices'"). MCI takes the same turn. In its opening brief, MCI argued that the "normal meaning" of "unbundled" is "'*separately available* at a separate price.'" MCI Br. 19 (emphasis added) (citation omitted). In its response brief, MCI suggests that a network element can be "unbundled" even if it cannot be made "separately available" from adjacent elements. MCI Reply 8 n.2 ("[e]lements that can be unbundled for use by a lessor at a separate price typically — though not inevitably — can be made available as physically separate items").

LECs to provide "*access* to network elements on an unbundled basis *at any technically feasible point*." 47 U.S.C. § 251(c)(3) (emphasis added). As explained in our opening brief (at 32 & n.16), the words "access to network elements * * * at any technically feasible point" undeniably has a physical dimension. Because the platform allows new entrants to use the incumbent's network as a bundled, amalgamated whole, the platform does not give entrants physical "access" to network elements at *any* point, let alone at a "technically feasible point." The platform, then, is flatly inconsistent with the text of section 251(c)(3). See Ameritech Br. 32-33; Bell Atl. Br. 57-60; GTE Br. 66.

Petitioners offer two wholly unpersuasive responses. The first is that section 251(c)(3) allows, but does not require, new entrants obtaining access to unbundled network elements to do so at a "technically feasible point." The second assumes that section 251(c)(3) requires new entrants to obtain access to network elements at a "technically feasible point," but holds that entrants acquiring the UNE platform would obtain such access through the incumbent's operations support systems ("OSS").

1. The FCC claims that section 251(c)(3) does not require a new entrant using unbundled network elements to obtain "access" to such elements at a "technically feasible point." Rather, the FCC asserts, section 251(c)(3) gives network element purchasers the choice of whether or not to obtain such "access." FCC Reply 28.

This reading of section 251(c)(3), which AT&T and MCI do not adopt,[7] is preposterous. The FCC maintains that

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[7] AT&T advances a less radical, but equally unpersuasive, variant of the FCC's argument. According to AT&T, "§ 251(c)(3)'s requirement that LECs provide access to 'network *elements*' (in the plural) at any 'technically feasible *point*' (in the singular) clearly establishes that new entrants can obtain access to network elements in combination." AT&T Reply 34 (AT&T's emphasis). This argument reflects a fundamental

the "access * * * at any technically feasible point" language in the statute is optional for new entrants.[8] If that were correct, then the "on an unbundled basis" language of section 251(c)(3) would have to be optional as well, and new entrants would be entitled to acquire network elements on something *other* than on an "unbundled basis." Indeed, if the FCC were right, a new entrant could acquire use of all of the incumbent LEC's combined network elements without obtaining "access" at a "technically feasible point" to *any* of them. That, of course, would destroy the distinction between unbundled network elements and resale services: If a new entrant could acquire under section 251(c)(3) all of the incumbent's network elements without obtaining "access" thereto, the entrant would acquire precisely what a reseller acquires under section 251(c)(4).

The FCC's statutory theory, in sum, would make a mockery of the statutory language. Section 251(c)(3) establishes the scope of the incumbent LECs' duty to provide, and a new entrant's right to acquire, network elements. Just as a

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misunderstanding of how unbundled access actually works. For example, a new entrant acquiring unbundled local switching from an incumbent LEC, and combining that switching with the entrant's local loops and interoffice transport facilities, must obtain "access" to local switching at *two* technically feasible points: the line (loop) side of the switch and the trunk (transport) side of the switch. See 47 C.F.R. § 51.319(c)(1)(i)(A)-(B) (Pet. App. 296a). (As a technical matter, the entrant would obtain such access via cross-connect wires terminating in its collocation space.) The fact that a new entrant can obtain access to a single network element at two technically feasible points shows that AT&T incorrectly attributes significance to the statute's use of "network elements" in the plural and "technically feasible point" in the singular.

[8] Contra *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98), First Report and Order, ¶ 269, FCC 96-325, 11 F.C.C.R. 15499, 15636 (1996) (J.A. 541) ("[w]e further conclude that * * * section 251(c)(3) *requires* 'access * * * at any technically feasible point'") (emphasis added).

new entrant must take network elements "on an unbundled basis," so, too, must the entrant obtain "access" to network elements at a "technically feasible point." The FCC's contrary interpretation would read the words "access * * * at any technically feasible point" out of the statute, in violation of the "cardinal principle of statutory construction" that courts must "give effect, if possible, to every clause and word of a statute." *Bennett* v. *Spear*, 117 S. Ct. 1154, 1166 (1997) (internal quotation marks omitted); see also *Bailey* v. *United States*, 516 U.S. 137, 145-46 (1995).

2. Petitioners next argue that new entrants acquiring the UNE platform would, in fact, obtain access to the incumbent LEC's network elements at a "technically feasible point." That access, they argue, is obtained at the incumbent's operations support systems ("OSS"). See FCC Reply 29; AT&T Reply 39-40; MCI Reply 12.

Even if OSS were an unbundled network element,[9] petitioners' argument would have no merit. OSS consists of the backoffice databases and information that support the incumbent's pre-ordering, ordering, provisioning, maintenance and repair, and billing functions. See 47 C.F.R. § 51.319(f)(1) (Pet. App. 301a). Although it is true that new entrants must use the incumbent's OSS when acquiring *unbundled network elements*, the same holds when an entrant acquires the incumbent's *resale services*.[10]

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[9] It is not. See Bell. Atl. Br. 69-70; GTE Br. 58-59; U S WEST Br. 37-41. Accordingly, access to OSS does not qualify as the "access to network elements * * * at any technically feasible point" required by section 251(c)(3).

[10] This is undisputed. See *In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act, as amended, To Provide In-Region, InterLATA Services in Michigan* (CC Docket No. 97-137), Memorandum Opinion and Order, FCC 97-298, ¶ 133 (rel. Aug. 19, 1998) ("*Ameritech Michigan 271 Order*") (access to OSS "supports each of the three modes of competitive entry strategies established by the

That fact defeats petitioners' argument. If use of the incumbent's OSS qualified as "access" to the incumbent's facilities at a "technically feasible point," then it necessarily would follow that resellers obtain such access. But the text of section 251(c)(4) makes clear that an entrant purchasing the incumbent LEC's resale services does *not* obtain access to the incumbent's network at a "technically feasible point." Compare 47 U.S.C. § 251(c)(3) (requiring entrant to obtain "access" to network elements "at any technical feasible point") with *id.* § 251(c)(4) (no such requirement for entrants acquiring resale services). Because a reseller uses the incumbent's OSS when purchasing resale services, use of OSS cannot possibly qualify as the "access * * * at any technically feasible point" required by section 251(c)(3). Indeed, a new entrant acquiring resale services uses OSS in the same manner as an entrant purchasing the UNE platform — with the touch of the entrant's keypad. It follows that a UNE platform purchaser's use of the incumbent's OSS cannot possibly distinguish the platform from resale; indeed, it simply confirms their equivalence.

In sum, new entrants acquiring the UNE platform, like new entrants engaged in the resale of the incumbent's retail services, do not obtain "access" to the incumbent's network elements at a "technically feasible point." Therefore, the UNE platform is not a combination of unbundled network elements within the meaning of section 251(c)(3).

Act: interconnection, unbundled network elements, and services offered for resale"); AT&T Reply 46 ("nondiscriminatory access to [OSS] is necessary to the statutory requirement that LECs provide nondiscriminatory access to * * * services for resale").

II. The UNE Platform Undermines The Structure Of Section 251(c) By Obliterating The Statutory Distinction Between Access To Unbundled Network Elements And Resale.

The foregoing textual arguments are sufficient, in and of themselves, to find that the UNE platform violates section 251(c). But the platform is invalid for an additional reason: it obliterates the distinction between the unbundled network element and resale entry options established by Congress in sections 251(c)(3) and 251(c)(4), and thus undermines the structure of section 251(c). See Ameritech Br. 24-31.

Unlike competitors that combine unbundled network elements into a competing network, new entrants acquiring the UNE platform would not design and establish their own alternative network; would not determine the amount of network elements necessary to carry their customers' traffic; would not make an up-front investment in all of the necessary elements; and would not make any effort even to identify the particular network elements they need. Rather, the platform would allow new entrants to use the incumbent's entire preassembled network — identical to what an entrant acquires when purchasing resale services under section 251(c)(4). Yet the platform would be priced *not* at the retail-minus-avoided-cost rate mandated by section 252(d)(3) for the resale of retail services, but rather at the cost-based rates reserved in section 252(d)(1) for unbundled network elements.

Petitioners do not and could not challenge our central proposition: that the 1996 Act prohibits new entrants from obtaining resale services at the cost-based rates reserved for unbundled network elements. Compare 47 U.S.C. § 252(d)(1) with *id.* § 252(d)(3). See also H.R. Rep. 104-204, at 71-72 (1995) (while rate for "unbundling" is based on "cost," the "resale rates" for resale services "should * * * take into account the rate at which local service is tariffed in a particular State"); Ameritech Br. 25, 27-30. Nor do peti-

tioners seriously challenge our argument that entrants using unbundled network elements must design and establish their own alternative, competing network. See Ameritech Br. 26-27.

These are significant concessions. If the UNE platform is equivalent to resale services for all material purposes, *or* if the platform permits new entrants to compete without designing and establishing an alternative network, then there can be no dispute that the platform violates the 1996 Act. Thus, petitioners have no choice but to argue that the UNE platform is somehow distinct from resale. Their arguments are far-fetched and meritless.

1. a. Petitioners spill much ink attempting to show that the UNE platform and resale services are distinct telecommunications products. But nowhere do they challenge, let alone disprove, the fact that both consist of the same preexisting, bundled network through which the incumbent carrier provides retail service to its own customers. Accordingly, petitioners do not, and could not, explain why Congress would have established a separate resale entry option (§ 251(c)(4)), with its own wholesale rate structure (§ 252(d)(3)), if it wished to permit entrants to obtain the same product through the network element entry option (§ 251(c)(3)) at cost-based rates (§ 252(d)(1)).

AT&T simply denies that Congress intended to "preserv[e] a separate role for the resale authorized by § 251(c)(4)," arguing that preservation of the resale option is a "non-textual objective[] of Congress" dreamed up by cross-petitioners. AT&T Reply 19. That is absurd. Because Congress established three entry options, with different rules governing each, it must have expected that each would play a separate role in the development of local competition. Congress could not have intended, and the 1996 Act does not allow, new entrants to get the benefit of the cost-based unbundled network element rate structure when acquiring an incumbent LEC's resale services. The UNE platform would

have precisely that effect. Thus, far from being a "non-textual objective[ ]," the distinction between the resale and unbundled network element entry options is firmly established in the statutory text. See *Bennett*, 117 S. Ct. at 1166 (citing cases). The fact that the FCC has different policy objectives than those reflected in the statute does not entitle the agency to disregard this statutory command.

b. Petitioners next attempt to show that the UNE platform is different from the incumbent LEC's resale services. Yet their arguments contradict what they have said outside of this litigation. In other forums, AT&T and MCI have not hesitated to admit — indeed, boast — that the UNE platform gives new entrants access to the same thing as resale, but at cost-based rates. For example, in a meeting with investment analysts, AT&T's president touted the UNE platform as "another way to resell" the incumbent's retail services, but at an effective discount twice as deep as the wholesale discount applicable to resale services under sections 251(c)(4) and 252(d)(3).[11]

Along the same lines, AT&T and MCI have argued to State commissions across the country that they should be permitted to obtain what has been dubbed "as is" migration to the UNE platform.[12] With "as is" migration, an incumbent LEC retail customer switches carriers and becomes, instantaneously and with the press of a button, an AT&T or MCI UNE platform customer. As AT&T argued less than three months ago — elsewhere, of course — "as is" migra-

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[11] Transcript, Investment Community Meeting (Mar. 3, 1997) (comments of John Zeglis) ("Zeglis Statement") (J.A. 255-256).

[12] See, *e.g.*, Comments of AT&T Communications of Ohio Regarding the Effect of the Eighth Circuit Order, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 6-9 (filed Aug. 19, 1997); Comments of MCI Telecommunications on the Impact of the Decision of the Eighth Circuit, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 6-9 (filed Aug. 19, 1997).

tion to the UNE platform is appropriate "for Ameritech retail customers who want to keep *the same type of service using the same equipment* but simply want to switch local service providers from Ameritech to AT&T." In those circumstances, AT&T noted, "no physical changes are necessary and no interconnection charge will be assessed."[13] That is, of course, exactly what happens when an Ameritech retail customer switches and becomes an AT&T *resale* customer. AT&T's candid admissions confirm that even AT&T believes that, putting aside price, the platform is indistinguishable from resale services.

Notably, petitioners remain silent on these matters, which figured prominently in our opening brief (at 16-17). Instead, they offer platitudes concerning how the UNE platform will allow AT&T and MCI to offer "different services" than those offered by the incumbent LEC for resale. See FCC Reply 38-40; AT&T Reply 20-21; MCI Reply 15. That argument, even if it were true, begs the question. Regardless of which new services a new entrant can *provide* with the UNE platform, an entrant ordering the platform *receives* the same thing from the incumbent LEC as an entrant ordering a resale service — the preexisting, bundled network that the incumbent uses to provide retail service to its own customers — but at the cost-based rates applicable to unbundled network elements. Again, Congress would not have established a separate resale entry option, with a separate rate structure, if it wanted to allow new entrants to obtain the same product via the unbundled network element option.

In any event, petitioners give few examples of the "different services" the UNE platform supposedly will allow new entrants to offer, and those examples belie any such distinction. For instance, AT&T suggests that the platform

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[13] AT&T's Memorandum Contra to Ameritech Ohio's Application for Rehearing and Request for Stay, Case No. 96-922-TP-UNC (Pub. Util. Comm'n of Ohio), at 25-26 (filed May 4, 1998) (emphasis added).

would permit it to "use its own operator service facilities in combination with LEC network elements." AT&T Reply 41. That hardly distinguishes the platform from resale services, because AT&T's interconnection agreements with Ameritech allow AT&T to use its own operator service facilities in conjunction with resale services acquired from Ameritech.[14]

Perhaps most significantly, petitioners do not challenge the proposition that new entrants using the network element entry option, unlike resellers, must design and establish their own alternative, competing network. See Ameritech Br. 26-27. Establishing an alternative network requires, at a minimum, that the new entrant designate and combine the particular network facilities that will carry its customers' traffic. Yet the UNE platform *relieves* entrants of these obligations by permitting them to use the incumbent LEC's entire bundled, preassembled network. Like resellers, then, entrants acquiring the platform do not establish their own competing network, but simply use the incumbent's existing network.

In the end, the FCC is reduced to the *ipse dixit* that the UNE platform and resale are different because an entrant purchasing the platform "does not resell anything; it leases an incumbent's underlying elements." FCC Reply 38. But if AT&T were to obtain the UNE platform on an "as is" basis, it would do the same thing that a reseller does: provide local service to its own customers by acquiring the same preexisting, bundled network used by the incumbent to serve the incumbent's customers. Thus, although AT&T *nominally*

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[14] See, *e.g.*, Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 by and between Ameritech Information Industry Services and AT&T Communications of Illinois, Inc., § 10.10.2 (approved by the Ill. Commerce Comm'n Jan. 8, 1997) (when AT&T acquires a resale service from Ameritech, "Ameritech shall make available to AT&T, upon AT&T's request, the ability to route * * * Local Operator Services calls (0+, 0-) dialed by AT&T Customers directly to the AT&T Local Operator Services platform * * * to the extent such routing is technically feasible").

would be leasing the incumbent LEC's network elements, in substance it would receive from the incumbent precisely what a reseller acquires — but at cost-based rates.

c. The FCC understandably is loathe to acknowledge our point that the UNE platform is indistinguishable from resale. In addition to insisting that the "UNE platform" label transforms the incumbent's preassembled network into a different product, the FCC also asserts that the platform will be a boon to facilities-based competition. See FCC Reply 33-41. However, the FCC's former Chairman — under whose direction the agency promulgated the rules designed to give new entrants access to the UNE platform — recently repudiated the central premises of the FCC's position at a hearing before the Illinois Commerce Commission. Addressing the UNE platform, Mr Hundt stated:

> I think it has to be stipulated that real competition, competition that brings investment and innovation, * * * has to be essentially facilities based. I think all versions of resale are transitional techniques. The UNE platform is a version of resale.[15]

Thus, as both AT&T's president and the former FCC Chairman have acknowledged, there is no difference between the UNE platform and resale. The platform therefore is antithetical to the separate unbundled network element entry provisions enacted by Congress.

2. Petitioners also do not come to grips with our second proposition: that the UNE platform, priced at the cost-based rates reserved for unbundled network elements (§ 252(d)(1)) rather than the retail-less-avoided-cost rate established for resale (§ 252(d)(3)), creates arbitrage opportunities that obliterate the distinction between the network element and resale entry options. See Ameritech Br. 27-30.

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[15] *In the Matter of: Telecommunications Policy Open Meeting*, Tr. 235 (Ill. Comm. Comm'n July 14, 1998) (statement of Reed Hundt).

a. *First*, petitioners argue that the UNE platform will not nullify the resale entry provisions because new entrants will acquire the incumbent LEC's resale services under section 251(c)(4), rather than the platform under section 251(c)(3), when it is less expensive to do so. See FCC Reply 40 n.27; AT&T Reply 23; MCI Reply 13. But that only confirms our point. It is a prescription for arbitrage to allow a new entrant, when obtaining use of an incumbent LEC's entire bundled network, to invoke the label "resale" when the resale rate is lower than the UNE platform rate, and the label "UNE platform" when the UNE platform rate is lower than the resale rate. Regardless of which rate is lower, there is only one legal rate for use of the incumbent's entire bundled network on an "as is" basis: the retail-minus-avoided-cost rate established in section 252(d)(3) for resale services. Allowing new entrants to obtain cost-based rates simply by using a different label would corrupt the 1996 Act.

Requiring new entrants to abide by the 1996 Act's resale provisions does not, as petitioners claim, improperly "disadvantage" or "limit" the network element entry option in favor of the resale entry option. See AT&T Reply 23; MCI Reply 20; FCC Reply 37. It simply enforces Congress' explicit command that the wholesale rate structure apply to resale services. See 47 U.S.C. §§ 251(c)(4), 252(d)(3). Likewise, it reserves the cost-based network element rate for those entrants that actually use unbundled elements to establish a competing, alternative network. See *id.* §§ 251(c)(3), 252(d)(1).

b. *Second*, petitioners maintain that the UNE platform imposes pricing risks not assumed by resellers. See FCC Reply 39; AT&T Reply 24-25; MCI Reply 15-16. AT&T argues that "in contrast to resellers of [incumbent] LECs' retail services, a network element purchaser can *never* avoid the fact that its profit or loss depends on customer usage volumes and usage patterns." AT&T Reply 25 (emphasis added). AT&T's claim rests upon the premise that a new

entrant must charge its UNE platform customers a flat monthly rate for local service. That premise is false: AT&T can simply establish a rate consisting of a low monthly flat fee, plus additional charges based upon the customer's usage — just as incumbent LECs establish similar usage sensitive rates for their own retail customers. That would guarantee that an entrant using the UNE platform would recover the costs incurred by its customer's high usage volumes.

c. *Third*, petitioners argue that new entrants acquiring the UNE platform, unlike resellers, will have to incur costs establishing systems to bill and collect for exchange access services. See FCC Reply 39-40; AT&T Reply 24-25. This argument fails on a number of grounds. Most obviously, as ALTS points out, "almost all new entrants" — including, presumably, giants like AT&T and MCI — already "have the back office systems and financial resources" necessary to bill and collect when using the UNE platform. ALTS Opposing Br. 17-18.

Moreover, the FCC and AT&T grossly exaggerate the efforts a new entrant must undertake to bill for and collect exchange access revenues when using the UNE platform. In opposing Ameritech Michigan's application for authority to provide long distance services, AT&T argued that *Ameritech* was obligated to provide the "billing detail" necessary for AT&T to collect exchange access revenues.[16] In its order denying Ameritech's application, the FCC agreed that Ameritech has an "*obligation* to provide usage information to competing LECs * * * in a manner that permits competing LECs to collect access revenues." *Ameritech Michigan 271*

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[16] *In the Matter of Application by Ameritech Michigan for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Services in the State of Michigan*, CC Docket No. 97-137, Affidavit of Robert V. Falcone and Robert A. Sherry on Behalf of AT&T Corp., ¶¶ 78-81 (filed June 10, 1997); *id.*, Affidavit of Robert V. Falcone and Maureen E. Gerson, ¶¶ 32-33 (filed June 10, 1997).

Order, ¶ 330 (emphasis added). This puts the lie to the FCC's and AT&T's argument in *this* litigation about the alleged burdens of establishing systems to bill for and collect exchange access revenues.

Indeed, a UNE platform purchaser's ability to collect exchange access revenues can hardly be termed a "responsibility" or a "task" (FCC Reply 38) at all. Rather, it is an additional *benefit* that exacerbates the arbitrage opportunities created by the platform. When a new entrant's resale customer makes or receives a long distance call, the incumbent LEC collects "access" charges from the long distance company as compensation for originating or terminating the call. However, if the entrant serves its customer via the UNE platform, the entrant would collect the access revenues — even though it would do nothing more than a reseller does to originate or terminate the call. A new entrant acquiring the UNE platform, then, not only would pay the cost-based rates reserved for unbundled network elements, but *also* would collect access charges from long distance companies. Thus, petitioners' argument that the new entrant's ability to "compete in the highly profitable market for exchange access" (MCI Reply 14; see also AT&T Reply 21-22; FCC Reply 38-39) distinguishes the UNE platform from resale is correct — and supports *our* position on the platform.

d. As explained in our opening brief (at 29-30, 38-40), the real reason why AT&T and MCI want to affix the "UNE platform" label rather than "resale" to use of the incumbent's entire bundled network is because those carriers are dissatisfied with the retail-less-avoided-cost rate structure established by Congress in section 252(d)(3). It therefore is ironic that petitioners repeatedly accuse us of relying upon "policy" arguments in opposing their efforts to obtain the UNE platform at the cost-based rates reserved by section 252(d)(1) for unbundled network elements. See FCC Reply 38-39; AT&T Reply 19; MCI Reply 18. For the reasons set forth above, it is the statutory text and structure that supports —

indeed, compels — the conclusion that the UNE platform would obliterate the distinction between the unbundled network element and resale provisions of the 1996 Act.

3. Finally, petitioners do not even address our argument that the UNE platform would allow the large long distance carriers to evade the joint marketing restrictions of section 271(e)(1). See Ameritech Br. 30-31. Petitioners' only possible defense would be that the UNE platform is somehow distinct from resale services. Such a claim, however, lacks merit for the reasons set forth above.

* * *

As ALTS correctly observes, the UNE platform is a tool of "the long distance companies" like AT&T and MCI that "have not invested to the same degree in local competitive facilities" as ALTS members, but that nonetheless want to enter local service markets by acquiring resale services on the cheap. ALTS Opposing Br. 7. The fact that ALTS — whose members compete by combining their facilities with the incumbent's unbundled network elements — opposes the UNE platform puts the lie to petitioners' refrain that opponents of the platform simply wish to "cripple" (AT&T Reply 33) the network element entry option. Indeed, by seeking to allow new entrants to acquire the incumbent's resale services under the label "UNE platform," it is petitioners that seek to eliminate one of the entry options explicitly created by Congress.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it upholds the "all elements" rule. If this Court determines that the "all elements" rule and Rule 315(b) are valid on their face, the Court should hold that the rules are invalid to the extent they require incumbent LECs to provide the UNE platform at the cost-based rates reserved for unbundled network elements.

Respectfully submitted.

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